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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Carriage of the Transmissions )  
of Digital Television Broadcast Stations )  
 )  
Amendments to Part 76 of the Commission's Rules )

CS Docket No. 98-120

TO: The Commission

COMMENTS

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**COMMENTS**

These comments are filed on behalf of Benedek Broadcasting Corporation, Chronicle Broadcasting Company, Draper Communications, LIN Television Corporation, Midwest Television, Paxton Media Group, Raycom Media, and Spartan Communications (licensees and owners of the stations listed in Appendix A) (the "Broadcast Group").<sup>1</sup> The members of the Broadcast Group operate stations in largely, but not exclusively, smaller and medium-sized markets. They have a long tradition of serving the public interest in their local communities, and they are dedicated to sustaining and enhancing that tradition while bringing digital television to their communities under aggressive DTV roll-out schedules.

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<sup>1</sup> Benedek Broadcasting Corporation supports these Comments, except that with respect to Section V, Benedek supports the position taken in the comments filed in this proceeding by the National Association of Broadcasters.

## I. INTRODUCTION AND SUMMARY.

The Broadcast Group is participating in this proceeding to ensure that the perhaps understandable focus of the industry, Congress and the Commission on the potentially divisive questions surrounding digital must-carry does not leave unresolved a range of other critical questions—regarding, for example, market definition and the nature (rather than the extent) of digital signal carriage on cable. The resolution of those issues will determine the direction and ultimate success of digital television just as much as will the Commission's decision on must-carry. Although these comments address the overall must-carry issue (*see infra* pp. 25-29), the Broadcast Group urges the Commission to face and resolve directly and expeditiously the other issues that, regardless of the specific must-carry obligations the Commission adopts, will govern the terms of digital cable carriage during the transition from analog to digital service.

These rules will provide much of the regulatory framework against which the relationships between broadcasters and cable operators, as well as between broadcasters and program suppliers, will be spelled out in the digital television environment. Thus, the definition of digital television markets—like the definition of television markets in the analog environment—will be shaped by the Commission's decision regarding the applicability of the network non-duplication and syndicated exclusivity rules to digital signals. And a decision extending the existing non-duplication rules into the digital environment is essential to the ability of broadcasters to maintain their positions as local outlets and to acquire program content on a predictable basis.

Moreover, the Commission's definition of the *characteristics* (as opposed to the extent) of full cable carriage of digital broadcast signals will provide an essential benchmark for digital retransmission consent and cable carriage negotiations, and thus will

be important regardless of the must-carry or retransmission consent regime the Commission adopts. Rules concerning the characteristics of digital cable carriage (for example, establishing a channel position protocol and defining the carriage requirements for content that in the current analog environment is transmitted in the VBI) will afford both the broadcast and cable industries some much-needed certainty as they negotiate for carriage of digital signals in a must-carry or retransmission consent regime. And broadcasters and equipment manufacturers will be better able to prepare business plans and develop digital products and services if they understand *how* digital broadcast signals ultimately will be carried.

These issues need not and should not await the resolution of must-carry requirements; they require resolution and immediate effectiveness, even if must-carry requirements are staggered or delayed. We believe that the ultimate success of digital television—which is itself critical to the future of local broadcasting—requires both regulatory certainty and regulatory expedition. As we have noted, certainty is needed to facilitate the resolution of business relationships among the participants. And speed is essential because the marketplace in which these new services will be offered is changing rapidly, as consumer expectations and demand are being shaped and expressed. Prolonged uncertainty regarding the rules of the road will render it difficult for broadcasters, programmers, cable operators and equipment manufacturers to proceed, and could cause the transition to falter. For these reasons, we urge the Commission to act expeditiously with regard to the matters discussed here (as to many of which there is no serious controversy), even if (contrary to our hopes) the Commission is unable to resolve the must-carry question with equal speed.

With respect to the standard that should govern the resolution of these issues, the touchstone is clear: The rules defining *how* digital signals will be carried on cable should be designed to advance the central goal of both the 1992 Cable Act that mandated this proceeding and the DTV proceeding that serves as its backdrop: to preserve free, local, over-the-air television service, even as the traditional analog service is replaced by digital. Toward that end, the rules should serve two critical functions that will maintain the spirit of localism at the heart of the broadcast service and will ensure the competitiveness of free broadcasting in the face of cable's "gatekeeper" capacity to control the delivery of video services to the home. The rules should protect the integrity of (1) the television markets that local broadcasters are licensed, required, and committed to serve and (2) the digital signals that broadcasters make available free and over-the-air to the viewing public.

**II. THE COMMISSION SHOULD ADOPT DIGITAL CABLE RULES THAT PROTECT THE INTEGRITY OF LOCAL TELEVISION MARKETS AND MAINTAIN THE TRADITION OF LOCAL BROADCAST SERVICE IN THE DIGITAL ENVIRONMENT.**

The Commission made clear in the *Fifth Report and Order* in the DTV proceeding that "an overarching goal of this proceeding is to promote the success of free, *local* television service using digital technology."<sup>2</sup> It is, of course, a truism that the principle of localism is central to the nation's free and universally available over-the-air television broadcasting service. As the Senate Commerce Committee observed in its Report on the 1992 Cable Act:

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<sup>2</sup> Fifth Report and Order, In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268, 12 FCC Rcd 12809, 12820 (1997) ("*DTV Fifth Report & Order*") (emphasis added, original emphasis omitted).

America's system of broadcasting . . . is a unique scheme that emphasizes responsiveness to the local community and places the broadcaster in the role of public trustee for the frequencies it is permitted to use. There is no doubt that, over the past forty years, television broadcasting has provided vital local services through its programming, including news and public affairs offerings and its emergency broadcasts.<sup>3</sup>

The Broadcast Group believes that the value and importance of localism will increase as analog broadcasting is gradually replaced by digital. Digital technology will enable providers of video programming to offer a wide array of new and improved programming services, including many that will be targeted to local needs and interests.<sup>4</sup> If that potential is to be realized, however, the local broadcast service, with its "responsiveness to the local community," must be preserved and fostered through the digital transition.

The success of local broadcasting has depended to a significant extent on two factors: (1) the integrity of the local markets that ensure broadcasters' ability to serve the local public interest,<sup>5</sup> and (2) the ability of local broadcasters to compete for local viewers

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<sup>3</sup> Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 92, 102d Cong., 2d Sess. 41-42 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1174-75 ("1992 Cable Act Senate Report").

<sup>4</sup> The possibilities are far too numerous to catalog, but include such services as multiplexed news broadcasts targeted to local communities within stations' service areas or multiplexed streams of educational programming linked to local high school or college curricula. *See also infra* at p.16.

<sup>5</sup> *See 1992 Cable Act Senate Report*, at 42, *reprinted in* 1992 U.S.C.C.A.N. at 1175 ("This system [of local television broadcasting] cannot function properly, of course, unless local television stations have access to the viewers they are licensed and required by the FCC to serve.") (quoting testimony of Edward Fritts before the Communications Subcommittee of the Senate Commerce Committee). The Commission has also recognized the importance of the definition and protection of local markets to the vitality of localism in television broadcasting. *See Report and Order, In re Implementation of the Cable Television Consumer Protection Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, 8 FCC Rcd 2965, 2976-77 (1993) ("*Analog Must-Carry Report & Order*"); *Memorandum Opinion and Order, In re Implementation of the Cable Television Consumer Protection Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, 9 FCC Rcd 6729, 6727-28 & n.66 (1994) ("*Analog Must-Carry Memorandum Opinion & Order*").



on an equal footing with other providers of video programming services.<sup>6</sup> Because digital broadcasting, while technically different from analog, will be offered in the same markets and subject to the same market forces, these factors will be of equal importance and must be addressed in the digital context just as they are in the analog environment.

**A. Network Non-Duplication and Syndicated Exclusivity Protections for Digital Broadcast Signals Are Essential To Protect the Ability of Broadcasters to Serve Their Local Markets.**

The Commission's existing network non-duplication and syndicated exclusivity rules play a critical role in protecting the integrity of local markets by requiring cable systems to respect the contractual exclusivity rights that local broadcasters have negotiated with broadcast networks and syndicated programming providers. Under the rules, if a broadcaster has negotiated for exclusivity within its market, it is entitled to prevent cable operators from frustrating its right by importing duplicative programming into the local broadcaster's service area.<sup>7</sup>

The Commission has long recognized the importance of this protection to maintaining both the integrity of local television markets and the financial viability of local broadcasters, finding that the importation of duplicative non-local signals into a community can divert local viewers and advertising dollars from local stations and undermine both their ability to provide local service and their financial health.<sup>8</sup> In addition, the rules recognize that geographic exclusivity can be critical to protecting content producers and creators—

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<sup>6</sup> See *1992 Cable Act Senate Report*, at 45-46, reprinted in 1992 U.S.C.C.A.N. at 1178-79.

<sup>7</sup> See 47 C.F.R. §§ 76.92, 76.151 (1997).

<sup>8</sup> See Report and Order, *In re Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Gen. Docket No. 87-24, 3 FCC Rcd 5299 (1988) (discussing history of and continued need for cable exclusivity protection for local broadcasters).

because exclusivity in distribution maintains the value of content—and that preservation of that value “maintain[s] [broadcasters’] ability to deliver diverse programming to consumers.”<sup>9</sup>

To ensure that broadcasters have the same protection for exclusivity rights in digital programming, and to promote the development of diverse digital programming content, we urge the Commission to apply the analog network non-duplication and syndicated exclusivity rules to digital broadcast signals carried on cable.<sup>10</sup> Affording equivalent protection for contractual exclusivity rights in both analog and digital programming will also ensure that decisions concerning the interplay of exclusivity arrangements among NTSC and DTV signals will be determined by the market through negotiations between the interested parties. And compatibility in the regulatory regimes will enable those exclusivity arrangements to evolve as more digital broadcasters come on the air and more consumers purchase DTV receivers.

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<sup>9</sup> Report and Order/Notice of Proposed Rulemaking, In re Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46, 11 FCC Rcd 14639, 14656 (1996); *see also* In re Robin Cable Systems, L.P., d/b/a Palmetto Cablevision, Network Nonduplication Waiver Request, 10 FCC Rcd 6670, 6672 (1995) (network non-duplication and syndicated exclusivity rules foster competition in video programming markets and facilitate “the creation of a more diverse and responsive communications environment”).

<sup>10</sup> It is arguable that the existing rules by their terms apply to digital broadcast stations that enter into agreements for network non-duplication and/or syndicated exclusivity rights. The existing rules grant enforcement rights to “television broadcast station licensees,” 47 C.F.R. § 76.93, which would appear to include *digital* television broadcast station licensees. However, because the rules define “television broadcast station” by reference to the NTSC Table of Allotments, *id.* § 76.5(b), the rules could be read as limited to NTSC stations. The Commission should clarify that the network non-duplication and syndicated exclusivity rules apply to digital channels carried on cable, perhaps by adding a reference to the DTV Table of Allotments/ Assignments in the definition of “television broadcast station.”

The *Notice of Proposed Rulemaking* in this proceeding questions whether, in an age of retransmission consent, the network non-duplication and syndicated exclusivity rules should be repealed and exclusivity rights enforced as a matter of contract among broadcasters and cable operators rather than through the existing complaint procedure.<sup>11</sup> The Broadcast Group believes that the Commission should not repeal the network non-duplication and syndicated exclusivity rules or reduce their applicability in the digital context, but should make clear that broadcasters are free to waive the rules' protections or to provide for their enforcement by contract if they so choose in their individual market situations.

Broadcasters should not be required to rely solely on retransmission consent negotiations to obtain non-duplication and exclusivity protection for digital content. Given the initially limited penetration of digital service, it is unclear at this point how many broadcasters will opt for, or have the bargaining power to negotiate for, a retransmission consent regime for digital signals. Surely, that limited penetration will contribute little in the way of leverage to a station required to seek carriage of two signals. Thus, some stations might well be able to obtain carriage and non-duplication protection for their digital signals and services because of the current strength and importance of their analog signals. But it is likely that in many cases a station will be able to negotiate under a retransmission consent regime for its analog signal, but will lack the bargaining power to extend those negotiations

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<sup>11</sup> Notice of Proposed Rulemaking, In re Carriage of the Transmissions of Digital Television Broadcast Stations, CS Docket No. 98-120, FCC 98-153, ¶ 96 (released July 10, 1998) ("*Notice*").

to cover digital carriage or its characteristics.<sup>12</sup> As broadcasters take the massive (and mandated) step of transitioning to digital, they should not be hindered in their efforts to deliver digital television to consumers by a regulatory regime that depends on the market power they might have in the analog environment.<sup>13</sup> At least in the absence of experience with digital retransmission consent and before the growth of the digital service, the Commission should not leave solely to the marketplace the resolution of issues affecting the protection of the digital signal and the integrity of broadcast markets.

For these reasons, we believe that network non-duplication and syndicated exclusivity protection should, among other things, serve as a carriage “baseline,” which may be waived by a broadcaster, but which in the absence of waiver is imposed on cable systems. But because marketplace circumstances will vary, we agree that the rules should permit (but not require) broadcasters carried pursuant to retransmission consent to negotiate to modify their rights to network non-duplication and syndicated exclusivity and to redefine the nature and extent of non-duplication and exclusivity enforcement.

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<sup>12</sup> If a digital broadcaster that has obtained non-duplication or exclusivity rights from a program provider were unable to negotiate for carriage (and exclusivity protection) on its local cable system, and non-duplication and syndicated exclusivity rules were not in place, the cable operator would be free to import a distant DTV station that duplicates the programming in which the local station holds exclusivity rights. This step could erode the local station’s market and advertising revenues (beyond the extent to which they already would have shrunk as a result of the station’s inability to obtain cable carriage), and could make it difficult, if not impossible, for the local station to continue to invest in the DTV transition.

<sup>13</sup> Even where a local broadcaster has sufficient market power to negotiate for digital cable carriage in a retransmission consent context, it should not have to trade off elements of full carriage to obtain protection for exclusivity rights for which it has already negotiated with program suppliers.

**B. The Rules Permitting Non-Carriage of Substantially Duplicative Stations Should Not Be Applied to Analog and Digital Signals Containing Otherwise Identical Program Content.**

Apart from their obligation to block specific duplicative programming subject to non-duplication or exclusivity protection, cable operators are entitled (though not required) under the analog rules to exclude from carriage the entire signal of a station that “substantially duplicates” the signal of “another” station already carried on the system.<sup>14</sup> To the extent that the rule requires a cable system that declines carriage of a duplicative station to carry the station located closest to its principal headend, this rule also helps to define local television markets and to promote localism in the broadcast service.

The *Notice* asks how “duplicative programming” should be treated during the DTV transition, and proposes three possible approaches: (1) base the “duplication” determination on program content, even if the programming is transmitted in different formats; (2) treat separate transmissions of analog and digital programming as not “duplicative,” regardless of program content, because the transmission formats are different; or (3) treat the “substantial duplication” provision as “not appl[icable] in the digital world” because Congress did not intend that the provision be used when “duplicative” signals originate from a single licensee transmitting in different formats.<sup>15</sup> Of these alternatives, both the second and third are consistent with the statutory language and intention. Identical program content transmitted in analog and digital signals is not “duplicative” programming, but two distinct program forms targeted at different audiences.<sup>16</sup> It is essential to the growth

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<sup>14</sup> 47 U.S.C. § 534(b)(5) (1994); 47 C.F.R. § 76.56(b)(5).

<sup>15</sup> *Notice*, ¶¶ 69-70.

<sup>16</sup> See *Analog Must-Carry Report & Order*, 8 FCC Rcd at 2971 (“[P]rograms in foreign languages (e.g. MacNeil/Lehrer in Spanish) are not duplicative of the same program broadcast in English, as they target different audiences.”).

and development of digital that the viewing audience be able to receive familiar content in digital form, and it is similarly critical that broadcasters be encouraged to provide as many digital hours of programming as quickly as possible—a goal which may, particularly when digital production capabilities and digital receiver penetration are limited, require two feeds of the same content.

When the analog and digital program forms are transmitted by a single licensee, it is all the more apparent that the signals should not be treated as “duplicative” under the rules. The statute provides that “a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of *another local television station* which is carried on the cable system.”<sup>17</sup> The legislative history explains that “substantial duplication” refers to “simultaneous transmission of identical programming on *two stations*” when identical programming “constitutes the majority of the programming on *each station*.”<sup>18</sup> We think that this language strongly suggests that Congress did not intend analog and digital signals from a *single licensee* to be treated as “duplicative” within the meaning of the statute, even if the signals contain identical program content. Moreover, to the extent that the rule helps to define local markets, there is no reason to exclude one of the signals of a licensee that has been licensed and allotted facilities to provide analog and digital signals to a single local market.<sup>19</sup>

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<sup>17</sup> 47 U.S.C. § 534(b)(5) (emphasis added).

<sup>18</sup> Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 628, 102d Cong., 2d Sess. 94 (1992) (emphasis added).

<sup>19</sup> Sixth Report and Order, In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268, 12 FCC Rcd 14588, 14605-07, 14630 (1997) (explaining that DTV allotments are designed to replicate NTSC service areas).

**III. THE COMMISSION SHOULD ADOPT DIGITAL CABLE RULES THAT REFLECT THE TECHNICAL CHARACTERISTICS OF DIGITAL SIGNALS AND PROMOTE THE GOALS OF THE 1992 CABLE ACT AND THE DTV PROCEEDING.**

An “overarching goal” of the proceedings to implement digital television is “to promote the success of a *free*, local television service using digital technology,” in order to “preserve for viewers the public good of free television that is widely available today.”<sup>20</sup> Because the analog carriage rules share the goal of preserving free, local television service, the Commission may look to those rules for guidance in devising digital cable carriage rules. However, the analog rules relating to the content and manner of carriage cannot be applied directly in the digital environment because the technical characteristics of digital signals, and the ways in which digital signals will be transmitted and carried on cable systems, are different. Thus, the Commission should devise digital cable rules that accomplish the goals of the analog rules while reflecting the technical characteristics of digital signals.

**A. The Rules Defining the Content of Digital Signals to be Carried on Cable Should Encourage Innovation and Development of Free Digital Broadcast Services.**

Digital television is an experiment that will be played out in the homes of American consumers. It offers the prospect for significantly enhanced, truly extraordinary video *as well as* new services that the audience is not accustomed to receiving from broadcasters or from television receivers. For that experiment to produce meaningful results, broadcasters and their video programming suppliers need the freedom to experiment with providing digital programming in various formats and with various complementary services—including the freedom to succeed and to fail and to try new avenues—without

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<sup>20</sup> DTV Fifth Report & Order, 12 FCC Rcd at 12820 (emphasis in original).

being denied access to their audience by a cable competitor with no interest in their success. If all of broadcasters' free digital signals are not passed through to cable subscribers, broadcasters will be denied the opportunity to gauge consumer interest in and response to the various digital services with which they will be experimenting and thus will be inhibited in their ability to develop the digital broadcast services that best serve the public interest. To ensure that the DTV experiment succeeds, the Commission should adopt digital cable rules that require cable operators to carry *all* of the information that a broadcaster transmits over-the-air for free.

We start with a description of the carriage content requirements in the analog context, as a backdrop against which digital rules should be considered.

#### **1. Analog Content.**

In the analog environment, each cable operator must "carry in its entirety . . . the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent feasible, program-related material carried in the vertical blanking interval. . . . The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited under Section 76.67 [sports broadcasts] or subpart F of Part 76 of title 47, Code of Federal Regulations [network non-duplication and syndicated exclusivity]."<sup>21</sup> The provision is designed to ensure that

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<sup>21</sup> 47 U.S.C. § 534(b)(3); *see also* 47 C.F.R. § 76.62(a), (e). In the analog environment, these requirements apply not only to signals carried pursuant to must-carry, but also to signals eligible for must-carry but carried pursuant to retransmission consent. In the Report and Order in the analog must-carry proceeding, the Commission noted that "Section 614(b)(3)(A) and (b)(4)(A) each refer to 'local commercial television stations,' and Section 614(b)(9) refers to 'a local commercial television station.' Using the same 'plain language' approach [it had] used in analyzing Section 614(b)(3)(B), [the Commission found] that these



local broadcast stations are carried pursuant to reasonable terms and that cable subscribers in fact receive the broadcast signals Congress intended them to receive over cable.<sup>22</sup>

Much of this requirement is self-defined and readily enforceable in the analog environment. With regard to “program-related” material, however, further definition has been necessary. The Commission has defined “program-related” material in the VBI as content that is “intended to be seen by viewers of the main program, during the same time interval as the main program, and . . . [that] is an integral part of the main program.”<sup>23</sup> But the Commission has also made clear that “there will be instances where material which does not fit squarely within the factors . . . will be program-related under the statute.”<sup>24</sup> Such material includes, for example, Nielson program identifiers, which must be carried because they “constitute information intrinsically related to the particular program received by the viewer” and “provide information that is useful to both broadcasters and cable operators.”<sup>25</sup>

## **2. Digital Content.**

The analog requirements provide a helpful starting point for determining what type of digital broadcast material cable operators should be required to carry to fulfill the objectives of the statute. But for both technical and policy reasons these analog rules cannot be applied directly to the digital environment. For example, the concept of “*primary*

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three provisions, in fact, apply to all local commercial television stations carried by a cable system, and not just to must-carry stations.” *Analog Must-Carry Report & Order*, 8 FCC Rcd at 3004. On reconsideration, the Commission held that stations not eligible for must-carry could negotiate with respect to carriage of the entirety of their program schedules, but reaffirmed that stations eligible for must-carry but carried pursuant to retransmission consent “are not permitted to negotiate for carriage of less than their entire signal.” *Analog Must-Carry Memorandum Opinion & Order*, 9 FCC Rcd at 6745.

<sup>22</sup> See *Analog Must-Carry Memorandum Opinion & Order*, 9 FCC Rcd at 6744-45.

<sup>23</sup> *Id.* at 6734.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

video” (and its accompanying audio) has little meaning in the digital environment, in which broadcast stations can multicast several streams of full programming. There is, in short, no “main” channel that can be used to define a “primary” service to which other services can be subordinated. In addition, there is no VBI in DTV, and closed captioning will be carried not in the VBI, but in the video stream.

We believe that the difference in technical characteristics between digital and analog signals frees the Commission from the restriction of defining the extent of carriage in terms of “primary video,” the VBI, or “program-relatedness.” It is obvious that, in adopting the analog rules, the Commission was addressing what was technically feasible in the analog 6 MHz channel and the VBI, and fashioned limits accordingly. But in the digital context, much more information can be transmitted in the 6 MHz channel, and carriage of multiple program streams or data enhancements will not pose technical problems for cable systems. Because of these different signal and transmission characteristics, the Commission is free to depart from the concepts of “primary video” and “program-relatedness ” under its authority “to establish *any changes* in the signal carriage requirements” to ensure carriage “in accordance with the objectives” of the statute.<sup>26</sup>

Moreover, important policy concerns counsel against relying on narrow conceptions of “primary video” and “program-relatedness” to determine the content of digital signals to be carried on cable. The Commission’s goal should be to *encourage* the widest use of the digital channels to spur demand for DTV and to maximize the public

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<sup>26</sup> 47 U.S.C. § 534(b)(4)(B) (emphasis added); Cable Television Consumer Protection and Competition Act of 1992, H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 67 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1249 (“1992 Cable Act Conference Report”).

benefit from the new service. Because the capabilities of digital broadcasting remain unexplored and unknown at this point, no one can predict what sort of programs, information and services broadcasters will offer in their digital signals. And broadcasters should not be constrained in developing services for free over-the-air transmission by a narrow regulatory regime that requires them to prove that information in the signal is “related” to program material in a particular stream or is part of some “primary” stream of programming as the price for ensuring that services reach the consumer.

Such an approach surely would force the Commission into frequent full-scale adjudication of very subjective programming questions. For example, broadcasters may well offer digital streams that time-shift their analog schedules; offer in-depth further coverage of local or national news, either simultaneously with newscasts or at other times; provide continuous traffic and weather information; offer school and curriculum guides; give viewers simultaneous choices of multiple sports events; or provide in-depth program guide information for their own schedules or those of all video services available in the area.<sup>27</sup> Some of these will without a doubt be “related” to other programs. Some will appear less so, but will be part of and support the kind of comprehensive digital schedule that broadcasters should have the flexibility to create.

For these reasons, we urge the Commission to adopt digital cable rules that simply require cable operators to carry all information in a broadcaster’s digital signal that is available free and over-the-air, regardless of whether the information can be characterized as

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<sup>27</sup> Electronic program guides provided by a cable operator implicate different concerns than guides provided by broadcasters. Those concerns are discussed in Section III-B-2 below.

“program-related” or not.<sup>28</sup> In addition, the rules should require that all such information be transmitted in a manner that ensures that it is as fully functional on cable as it is when received over-the-air,<sup>29</sup> since impaired or limited carriage of such services generally will be tantamount to no carriage at all.

### **3. Cable Compatibility.**

Cable operators’ ability to satisfy their carriage content obligations is, at the current stage of technological development, constrained by limitations on cable operators’ technical capability to carry digital broadcast signals through their systems and into digital television receivers. If cable systems are unable to interface with digital television sets, cable operators obviously may be unable to ensure the functionality of features included in digital broadcast signals, such as channel navigation and program guide information and V-chip codes. Moreover, long-term incompatibility between cable equipment and digital consumer devices will lead to wide-spread consumer frustration that could seriously impede the DTV transition.

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<sup>28</sup> The only statutory guidance regarding the content of digital signals to be carried on cable is the provision of the 1996 Telecommunications Act that authorizes DTV licensees to broadcast “ancillary or supplementary services” but provides that “no ancillary or supplementary services shall have any rights to carriage” under the must-carry provisions. 47 U.S.C. § 336(b). The statute does not define “ancillary or supplementary services.” The Commission has suggested that “ancillary and supplementary services” should be defined to include “any service provided on the digital channel other than free, over-the-air services.” *DTV Fifth Report & Order*, 12 FCC Rcd at 12821. We agree that it is appropriate for broadcasters offering services for a charge to be required to negotiate for distribution with any distribution channel they choose to use. Otherwise, the Commission should protect consumer access to free digital services by requiring carriage of all of a broadcaster’s free, over-the-air signals.

<sup>29</sup> For example, cable operators should be required to transmit closed captioning information and broadcaster-provided program guides to subscribers in a manner that ensures that these services are displayed identically on the sets of cable subscribers and those who receive DTV signals over the air.

Therefore, the Commission should take steps to ensure that cable operators and receiver manufacturers develop an interface standard that will enable consumer and cable equipment to function together in the digital environment. Although the Commission need not prescribe the standard directly, it must do more than just sanction private standard-setting efforts, which may not move as quickly as the public interest demands.

We urge the Commission to compel action by setting a firm deadline by which necessary standards must be completed. The Commission has already expressed the expectation that the IEEE 1394 standard, which should go a long way towards enabling interoperability between cable systems and digital television sets, will be completed by November 1998 and available in DTV sets by November 1999. If it appears that the industries involved are not progressing steadily towards meeting that deadline, the Commission should set a short, firm deadline by rule and make clear that if the deadline is not met, the Commission may take a more active role in the standard-setting process.

The Commission should also recognize that other technical standards, including standards relating to encryption, video formats, channel navigation and program guides, need to be established or harmonized to enable digital consumer and cable equipment to interact fully. With respect to such open technical issues, the Commission should set firm deadlines, before November 1999, by which the standards must be finalized.

**B. The Rules Establishing the Manner of Carriage of Digital Signals Should Maintain the Competitiveness of Local Broadcast Signals in the Digital Environment.**

**1. Non-Degradation and Non-Discrimination.**

Under the analog cable rules, cable systems are required to transmit broadcast signals "without material degradation" in accordance with prescribed technical standards. In addition, "the quality of signal processing and carriage provided by a cable system for the

carriage of local commercial television stations [cannot be] less than that provided by the system for carriage of any other type of signal.”<sup>30</sup> The purpose of these requirements is to ensure that broadcast stations are able to compete for local viewership on an equal footing with other signals carried on the cable system.<sup>31</sup> These requirements recognize the reality that many cable operators have a far greater interest in preserving the quality and integrity of non-broadcast program services than they do in protecting the quality of broadcast signals.

Because the unique quality of the digital service will be a major part of what differentiates it from analog television, protecting that quality from “degradation” will be essential to attracting and building the audience interest necessary for digital television to succeed. In the digital context, the technical quality of the broadcast signal can be assured only if cable operators are required to carry each broadcaster’s entire qualified digital bit stream (excluding fee-based ancillary and supplementary services) in the format in which the broadcaster originally transmitted it.<sup>32</sup>

To be sure, some cable operators and others claim that different formats can produce television pictures of equal quality. However, as the Commission expected they would when it chose not to adopt a single video format as part of the digital television

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<sup>30</sup> 47 U.S.C. § 534(b)(4)(A); 47 C.F.R. § 76.62(b). This means that if an analog station provides a good quality picture at a cable system’s headend, the cable system must provide a good quality picture, comparable to that of other signals carried on the system, to its subscribers.

<sup>31</sup> See *1992 Cable Act Conference Report*, at 75, reprinted in 1992 U.S.C.C.A.N. at 1257.

<sup>32</sup> Broadcast information in digital form is of course represented by binary numbers contained in “bits.” When the bits are transmitted to a receiving device, they are translated back into the video, audio or other information they represent. In effect, we urge the Commission to hold that, if bits are stripped from the stream, the information received is not equivalent to the information transmitted, and the broadcast signal clearly has been “degraded.”

standard,<sup>33</sup> broadcasters have carefully examined the differences among the 18 available formats, and each has made, for its own reasons, an initial decision to transmit programming in a particular format. Ultimately the market will (and should) decide which formats survive. But that decision should be made by consumers, not by cable operators free to alter the formats in which broadcasters are making programming available. Thus, just as digital sets will be able to receive signals in any of the formats currently in use,<sup>34</sup> cable operators should be required to match all transmission formats in their digital delivery.<sup>35</sup>

## **2. Channel Position and Navigation.**

The placement of broadcast stations and the display of broadcasters' programming and channel information on cable systems will have a significant effect on broadcasters' ability to attract audiences to the digital service and remain competitive with cable programming. The analog rules recognize that cable operators (particularly those vertically integrated with programming providers) may well have an economic incentive to undermine the competitiveness of local broadcast stations, and their ability to serve their local communities, by shifting local stations around or "hiding" them in the cable channel

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<sup>33</sup> Fourth Report and Order, In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268, 11 FCC Rcd 17771, 17789-90 (1996).

<sup>34</sup> See, e.g., "Mass Media," *Communications Daily*, Sept. 17, 1998 (describing "all-format" Sony DTV receivers); Thompson Consumer Electronics Press Release, "RCA and PROSCAN Models to Offer Built-In Digital Reception from Local Broadcasters and Satellite" (Sept. 3, 1998).

<sup>35</sup> Broadcasters should, however, be free to consent to the "down-conversion" of their digital signals to another format, or to analog. Moreover, cable operators can be permitted to remodulate digital broadcast signals as long as the format and content of the digital bit stream is not altered.

map.<sup>36</sup> The analog rules thus prohibit such practices. But the incentive persists in the digital environment, and must similarly be addressed.

The analog cable rules require cable operators to carry local broadcast stations on channels selected by the broadcasters from the alternatives enumerated in the statute.<sup>37</sup> Such “on-channel” carriage protects analog broadcast stations because broadcasters have developed (and continue to develop) brand identities linked to their channel numbers.

During the digital transition, however, “on-channel” carriage will not protect broadcasters because channel numbers will not have the same meaning as they do in the analog context. Broadcasters’ digital channel numbers are new, unrelated to the broadcasters’ existing channel identities, and, for those broadcasters planning to move their digital operations to their NTSC channels at the end of the transition, temporary. In addition, digital broadcasts may include multiple channels of programming within the same 6 MHz channel. Thus, during the transition digital broadcasters should be protected from anti-competitive channel placement not by an “on-channel” carriage requirement, but by a rule requiring cable systems to ensure the functionality of channel navigation protocols that link broadcasters’ digital signals to their better-known analog channels.<sup>38</sup> This will both

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<sup>36</sup> See *1992 Cable Act Senate Report*, at 43-44, reprinted in 1992 U.S.C.C.A.N. at 1176-77 (“[S]hift[ing] the placement of [local] stations on [cable] systems . . . has the effect of stifling competition. Moreover, it has interfered with the ability of broadcasters to fulfill their statutory obligations to serve their communities. . . . [C]hannel repositioning has a direct and negative impact on the competitive viability of local broadcast stations and thus the ability to serve the needs of local communities.”).

<sup>37</sup> 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57.

<sup>38</sup> One such protocol is PSIP, which has been developed by the Advanced Television Systems Committee (ATSC) and is likely to be used by most broadcasters and decodable by most DTV sets.



maintain the competitiveness of local broadcasters and help to ensure effective channel navigation, which will make the digital transition smoother and less confusing for consumers.

Cable-generated electronic program guides (“EPGs”) also may increasingly provide a forum for anti-competitive conduct by cable systems seeking to “hide” broadcast stations in the channel line-up.<sup>39</sup> Recently, cable systems have begun to develop and/or provide interactive EPGs that display programming information in a non-channel-sequenced, graphic form. These EPGs can provide service names or logos (*e.g.*, NBC, HBO) in an order chosen by the cable system. When program information is provided in a non-sequenced form and the cable system has the unfettered right to design the listing, the cable system has the capability to discriminate against broadcast programming by placing it in a disadvantageous position in the EPG. For example, a cable system could list the programs of its affiliated programmers on the first page of the EPG and bury broadcast programming in deeper layers that may be difficult for viewers to access. Digital technology will afford cable systems more bandwidth and flexibility to provide interactive EPGs, and hence more opportunity to discriminate against broadcast programming.

To ensure that local broadcast stations are not displayed unfairly or “hidden” on cable EPGs, the Commission should adopt a non-discrimination requirement for cable-

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<sup>39</sup> As discussed in Section III-A-2, the cable carriage issue implicated by EPGs provided by *broadcasters* is whether the EPG is carried through the cable system and accessible to cable subscribers. We think it clear that a free channel guide must be passed through to the audience, both because such guides are invariably related to a station’s programming within the meaning of the existing rules and because they will be an important part of the free service broadcasters should be encouraged and enabled to offer to the public. The issue addressed in this section arises when the EPG is provided by the *cable system*; in